B.C.D. 06-47 **OCT 04 2006**

EMPLOYEE SERVICE DETERMINATION
RG

This is the decision of the Railroad Retirement Board regarding the status of RG as an employee of a covered railroad employer under the Railroad Retirement and Railroad Unemployment Insurance Acts (RRA and RUIA). The status of this individual as an employee has not previously been considered by the Board. For the reasons set forth below, the Board finds service performed by RG under contract with CSX Transportation (CSXT) to be service as an employee of the railroad for purposes of benefit entitlement under the RRA.

RG's case arises as a result of an audit of CSXT, a railroad employer covered by the RRA and RUIA, by the Board's Audit and Compliance Section which identified eight individuals working as contractors of the railroad who performed service in a manner which indicated they may be in the service of the railroad as employees within the meaning of the RRA and RUIA. In April 2003, the Board's Office of General Counsel advised the Audit and Compliance Section that the information obtained should be submitted to the Board Members for a determination regarding the status of these individuals as employees pursuant to section 20 CFR 259.1 of the Board's regulations. Subsequently, however, the Board, in Board Order 04-107, established a general policy which directed that investigations of the status of an individual as an employee may be closed without decision if neither the employer nor employee requested a decision, and available evidence "contains no reasonable basis for a finding" that employee service was performed. Accordingly, based on Board Order 04-107, the Board's Assistant General Counsel advised the Chief of Audit and Compliance by memorandum of December 30, 2004, that the information regarding the eight individuals would not be submitted to the Board. When informed of this determination, one of the eight individuals, RG, in a statement dated May 23, 2005, requested that service as an employee be credited under the Railroad Retirement and Railroad Unemployment Insurance Acts by reason of his contract with CSXT.

The evidence regarding RG shows that he was born January 1951, initially began work in the railroad industry in June 1974, but left in August 1977. He later returned for an additional seven months in 1987 to reach a total of 57 months of creditable railroad service at the end of that year. For the next eleven years RG worked in employment covered by the Social Security Act. Then, on September 29, 1999, RG entered into a contract with CSXT. The

contract was renewed on a yearly basis for 2000, 2001 and 2002. In June 2002, during the 2002-2003 contract term, CSXT hired RG as an employee. He worked as a CSXT employee until March 2004, when his job was eliminated. Beginning July 2005, RG has been employed by First Coast Railroad, a covered employer unrelated to CSXT. Through December 2005, RG has been credited in the records of the Board with a total of 89 months of railroad service.

RG described his service under the contracts in a statement dated May 20, 2003 in connection with the audit. According to this statement, RG worked as a chef for the food service of the Office Car Department. He worked either on a commissary car while on a trip over the railroad, or at a yard function, as assigned by a CSXT manager or assistant manager. His duties included ordering food, making menus, and supervising food preparation. RG might supervise "other contract workers" in the kitchen, or he might work alongside employees of the railroad. Whether on a trip or at the yard, a CSXT manager was "usually on board and controls all decisions". The manager also determined whether RG would work on a particular trip or function. CSXT provided his uniform and all supplies needed for the work. CSXT also provided his meals and lodging when on a trip, and reimbursed him for other extra expenses. RG was paid on a daily basis, working at times for 15 or 20 hours in a day. The CSXT supervisor signed his time sheet for payment after each trip or function. RG stated that he did this work only for CSXT.

The Board's Audit and Compliance Section contacted CSXT regarding the information RG supplied. In an attachment to an e-mail transmitted March 9, 2006, Mr. Michael Kennedy, Manager of Business Car Operations, responded on behalf of the employer. Mr. Kennedy confirmed that from November 1999 to about March of 2002, RG worked "in food service as the Chef, preparing all hot and cold meals for * * * in transit and static events." RG performed his service on CSXT property including "office" passenger cars operating out of Jacksonville, Florida. His work was assigned by the CSXT Assistant Coordinator of On-Board Services, who determined the work schedule and whether RG would be called for a particular assignment. RG was not called for every event because his service was rotated "with other contractors." The Assistant Coordinator would also instruct "and job brief" RG for each event, and had authority to specify food preparation (e.g., fried or broiled). RG also was required to complete CSXT safety training. Mr. Kennedy confirmed that RG was paid a daily flat rate, and was not required to provide insurance or post any bond. He stated RG was paid $18,938.04 from November 11, 1999, through December 23, 2000; and $24,389.38 from February 23, 2001 through March 1, 2002.

The Audit and Compliance Section also obtained a copy of RG's written agreement with CSXT. The contract consists of a document entitled "General Service Contract" and three "Term Sheets", dated September 29, 1999, September 11, 2000, and September 9, 2002. In the main, the General Service Contract sets forth a contractor's duties in general terms, with requirements specifically relating to RG appearing in the "Term Sheet" for each year. Thus, Article 1 of the Service Contract states in full that "Contractor agrees to perform the services set forth in Term Sheet for and as directed by CSXT", Article 3 states "This Agreement shall take effect on the Effective Date as shown in the Term Sheet and shall terminate on the Expiration Date as shown in the Term Sheet", and so forth. The three Term sheets specify that RG is to furnish "1-Attendant Service for CSX Business Car", and at a per diem rate of $175 from September 29, 1999 to October 2000; $200 from September 11, 2000 to September 11, 2001; and $125 from January 7, 2002 through January 9, 2003. The total payable for each year was limited to $45,000.

Among other noteworthy provisions of the General Service Contract, Article 7 states RG is to submit monthly invoices for payment. Article 6 allows the Manager of Business Car Operations or his designee to terminate the contract with 24 hours notice, but specifies no notice period for termination by RG. At termination, CSXT is obligated to pay only for work actually performed through date of termination, and RG is not released from any liability or obligation arising prior to termination. Article 15E also prohibits RG from assigning or transferring any rights or obligations under the Contract without written consent of CSXT, but imposes no similar restriction upon CSXT. Article 4 of the Contract states that "Contractor shall operate as, and have the status of, an independent contractor and shall not act as, or be, an employee or agent of CSXT." Article 14 further states that RG as contractor agrees to accept responsibility for payment of any and all contributions or taxes for unemployment insurance, and retirement benefits imposed under any law of the United States, and agrees to reimburse CSXT in the event the railroad is required to make these payments on his behalf. Article 12 also requires RG to indemnify the railroad from liability for loss, damage, costs and attorneys fees arising out of personal injuries or property damage to anyone, except when solely caused by negligence of CSXT.

To be an employee of a covered railroad employer for purposes of benefit entitlement under the Acts administered by the Board, RG must fall within the definition of that term provided by the Acts. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231(b) and (d)).

A determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and could hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. The Board has in recent years not applied paragraphs (B) and (C) to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business, relying on the decision of the

United States Court of Appeals for the 8th Circuit in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

The Kelm decision distinguished between services performed for the railroad by employees of a firm with a clearly independent existence, and services performed by an individual who primarily contracts to furnish only his own labor. 206 F. 2d at 835. Employees of a contracting firm must meet the direction and control requirements of paragraph (A), while single individuals contracting directly with the railroad may fall within the broader definitions of (B) or (C). In making a determination under these sections, the Board is not to be bound by the characterization of the relationship stated by the parties in a contract. Gatewood v. Railroad Retirement Board, 88 F. 3d 886, (10th Cir., 1996), at 891 (holding with respect to an attorney's agreement to perform professional services for the railroad as an independent contractor that " * * *merely to state that such a relationship exists does not necessarily make it so * * * .")

Applying these criteria to RG's case, the Board finds that the Kelm decision does not prevent consideration under paragraphs (B) and (C) because RG did not operate as independent business enterprise. CSXT contracted directly with RG individually for his service, rather than through a corporation, limited liability company, or other entity. RG evidently worked only for CSXT and had no employees himself. He was required to perform his services to the railroad in person, and could not delegate performance to anyone. He was paid at a daily rate rather than by a fee quoted for a particular event, and the contract does not allow him damages beyond payment for the time he worked if the railroad ended the contract. RG supplied no equipment, and had no investment in a business: his uniform, equipment and supplies were all furnished to him by CSXT. Though the General Services Contract does require RG to hold the railroad harmless from damages for injury to persons or property, he was not required to carry liability insurance or post any bond. Moreover, the language in the General Services Contract stating RG is an independent contractor is not itself determinative when weighed with other evidence. Gatewood, supra, and Holt v. Winpisinger, 811 F. 2d 1532, 1538 (D.C. Cir., 1987)(employment relationship established under ERISA).

The Board finds that the evidence of record supports the conclusion that RG meets the definition of employee under 1(d)(i)(B) and (C) of the RRA and the analogous provisions of section 1(e) of the RUIA during the period he performed service to CSXT. His professional services as a chef were performed under the supervision of, and alongside other employees of the railroad, and hence were integrated in CSXT staff on the business passenger cars. Further, the personal services he was required to perform for the

railroad as a chef were performed entirely on property of the employer as part of the CSXT business car functions, whether over the rails or when stationary in the yard.

Finally, the Board finds that the Board's record of RG's railroad compensation and service may be amended beginning with the first contract in September 1999. Section 9 of the RRA requires an employee contest errors in his record of service and compensation within four years after the day on which employer's return of the compensation was required to be made. Regulations of the Board in effect during the entire time RG performed service to CSXT provided that annual employer returns of compensation and service under section 9 of the RRA must be filed no later than the last day of February of the following year for which service was reported. See 20 CFR 209.8(1998). The employer's return of service and compensation for 1999 was therefore required to be filed by February 29, 2000. As noted above, RG first raised the issue of creditability of his contract service just over three years later, on May 20, 2003. This is within the four year limitation of section 9.

Accordingly, in view of all the evidence in the record, it is the determination of the Board that service performed by RG under his contracts dated September 29, 1999, September 11, 2000, and January 9, 2002, with CSX Transportation is covered employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. The employer is directed to submit such returns of service and compensation with respect to RG's service for 1999, 2000, 2001, and 2002 as Board staff may require.

Original signed by:

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